No. 87-1318

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD
JUNIOR UNIVERSITY, Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

APPELLANT'S REPLY BRIEF

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LIST OF AFFILIATED COMPANIES
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pensylvania corporation; and Courtnay's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.

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I. Introduction

Most of the arguments advanced in Stanford's brief have been adequately anticipated in Volt's opening brief and therefore require no further response. There are only four exceptions to this generalization. These four arguments will be dealt with in the discussion that follows.

II. Stanford's Argument Concerning the Scope of the Federal Rule Requiring "Generous Construction" of Arbitration Agreements

A. Contrary to Stanford's Argument, the Established Rule That Arbitration Agreements Should Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration" Must Necessarily Extend, Not Only to the Interpretation of the Arbitration Clause Itself, but Also to the Interpretation of Any Other Contractual Provision That Directly Determines the Arbitrability of the Parties' Dispute.

In its opening brief, Volt pointed out that this Court has frequently held that arbitration agreements subject to the Federal Arbitration Act must be "generously construed" in such a way as to promote the "federal policy favoring arbitration" (Opening Brief, pp. 49-52, 92-96, citing, among other decisions, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1986), and Moses H. Cone

Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). Volt invoked this established principle in support of its position both on the merits of this appeal and on the issue raised by Stanford's challenge to the Court's jurisdiction (id.). In the latter connection, Volt contended that the necessary application of this settled rule of federal law to the construction of the agreement at issue here constituted one of the several reasons why the court of appeal's interpretation of the choice-of-law clause in the agreement could not be said to rest upon an "adequate and independent state ground" (id., pp. 49-52).

In response to this contention, Stanford denies that this federal rule has any bearing upon this question of interpretation, and indeed asserts that its application in this context would produce an "amazing" expansion of the scope of federal common law tantamount to a resurrection of the discredited doctrine of Swift v. Tyson, 16 Pet. (41 U.S.) 1 (1842) (Stanford's Brief, pp. 12-13). Although Stanford apparently concedes that the rule would

apply to the construction of the arbitration clause itself in any agreement subject to the federal Act, it argues that the rule may not be applied to any provision of such an agreement other than the arbitration clause, even where, as in this case, the ultimate issue of the arbitrability of the parties' dispute depends directly upon the interpretation of another such provision of their contract (id.). Therefore, Stanford concludes, the doctrine has no application to the question of interpretation that is presented by this case, which concerns, not the arbitration clause itself, but rather the choice-of-law clause on which the court of appeal relied to relieve Stanford of its contractual duty to arbitrate (id.).

Stanford's effort to confine the coverage of the federal rule in this manner contravenes both the decisions of this Court enunciating the content of the rule and the policy considerations that ought to govern its practical application, both of which clearly establish that the rule in fact extends to all issues that directly determine the arbitrability of

any dispute subject to the federal Act, whether those issues concern the interpretation of the arbitration clause itself or some other provision or incident of the parties' contract. Thus, in its several formulations of the requirement of liberal construction of arbitration agreements, this Court has consistently described this rule as encompassing all "questions of arbitrability," wherever and however they might arise in the course of applying any of the provisions of the parties' contract. In its initial statement of this rule in its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, for example, the Court phrased the rule as follows (id., 460 U.S. at 24-25; emphasis added):

> "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. ... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

This passage from the Cone opinion was quoted with approval in the Court's most recent exposition of this settled principle in its

opinion in Mitisubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, where the Court additionally observed that, under this rule, all agreements subject to the federal Act must be "generously construed as to issues of arbitrability." Id., 473 U.S. at 626 (emphasis added). In none of the Court's opinions is there any indication that this policy of generous construction of arbitration agreements was intended to extend no further than to the language of the arbitration clause itself. Id.. See also Perry v. Thomas, __ U.S. __, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). In short, the Court has evidently gone to some lengths to make clear, in describing the terms of this federal policy, that its coverage is not in fact restricted in the way Stanford suggests, but rather extends to any "question of arbitrability" that may arise in any manner or under any provision of the parties' agreement in any case subject to the federal Act.

This conclusion regarding the broad scope of this doctrine is confirmed by the Court's

actual application of the doctrine in each of its prior decisions. In fact, all of these cases have involved some aspect of interpretation or application of the parties' agreement other than a construction of the terms of the arbitration clause itself. Thus, in three of the cases, the Court invoked the requirement of "generous construction" or the "federal policy favoring arbitration" for the purpose of disposing of a contention that an arbitration agreement containing a concededly unambiguous arbitration clause should nevertheless be denied enforcement pursuant to some legal rule entirely extraneous to the parties' agreement - consisting in one case of an alleged federal policy exempting antitrust claims from arbitration and in the other two cases of state statutes creating various other kinds of exceptions to the duty to arbitrate. Perry v. Thomas, supra, 107 S.Ct. at 2525-27; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 625-27, 631; Southland Corp. v. Keating, supra, 465 U.S. at 10-11. In the fourth case, the rule of liberal construc-

tion was applied in rejecting both a claim of waiver and an argument identical to the one advanced by Stanford in this case to the effect that a party should be excused from his duty to arbitrate when he becomes involved in related litigation with non-parties to the arbitration agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20, 24-25.

Thus, the actual holdings of all of the Court's decisions on this issue, as well as the language of the Court's opinions, conclusively establishes that the rule requiring liberal construction of arbitration agreements extends to any issue directly affecting the duty to arbitrate, whether the issue involves interpretation of the language of an arbitration clause or some other aspect of the application of the parties' agreement. As they have thus been defined by the decisions of this Court, these policies are therefore certainly broad enough to encompass the particular issue of contractual interpretation that is presented in this case, which Stanford itself concedes is the exclusive and decisive determinant of its duty

to arbitrate its present dispute with Volt.

Finally, this same conclusion likewise emerges from a consideration of the untoward practical consequences of restricting the scope of the federal rule in the artificial fashion advocated by Stanford. As noted above, Stanford contends that this rule should apply only to the language of the particular clause of the parties' agreement that expressly provides for the arbitration of their disputes, and that it should have no application to any other clause of the agreement, even if another such clause would directly affect the issue of arbitrability - and indeed even if, as in this case, that clause would effectively override and nullify all of the duties imposed upon the parties by the arbitration clause (Stanford's Brief, pp. 12-13). Quite plainly, this artificially truncated version of the scope of the federal rule would constitute a classic exaltation of form over substance.

This very criticism of a similar proposed restriction on the preemptive scope of an analogous rule of federal law was recently expressed

by this Court in the course of an opinion defining the coverage of the federal substantive law governing labor contracts subject to §301 of the Labor Management Relations Act. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). The question presented in that case was whether federal law should govern, not only suits brought for breach of such contracts, but also tort actions brought pursuant to state laws conferring a right of action for the tort of "bad faith breach of contract." The Court gave an affirmative answer to this question, reversing the state court's ruling that the tort of bad faith breach was "independent" of the obligations imposed by the contract. Id., 471 U.S. at 210-15. Characterizing this as a merely formal distinction, the Court held that the logical dependence of the tort claim on an assessment of the scope of the defendant's contractual duties rendered this state-law claim subject to federal preemption. In explaining its holding to this effect, the Court said (id., 471 U.S. at 210-11):

> "If the policies that animate §301 are to be given their proper range, ... the preemp-

> tive effect of §301 must extend beyond suits alleging contract violations. ... [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims as claims for tortious breach of contract."

As in Lueck, supra, so in this case: to deny application of federal law to the interpretation of a contractual provision that directly determines the arbitrability of a dispute otherwise subject to the Federal Arbtration Act merely because that provision does not happen to appear in the particular clause of the contract entitled "Arbitration" would plainly "elevate form over substance" and substantially undermine "the policies that animate[d]" the enactment of that federal statute.*

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* Of course, Volt is not suggesting, by its citation of the Lueck decision, that federal preemption should extend as broadly in the field of arbitration law as it does in the area of labor law, where this Court has decreed that every provision of a collective bargaining contract must be interpreted in accordance with a uniform federal law. Rather, the relevant lesson to be drawn from the holding (continued)

Stanford is unable to cite any authority directly supporting the contrived restriction on the coverage of the federal rule that it is proposing here. It seeks to derive some indirect support, however, from this Court's disposition of one of the ancillary issues that was presented in the recent case of Perry v. Thomas, supra. In that case, the appellee, who had unsuccessfully sought to avoid federal pre-emption of a California statute limiting the arbitrability of certain disputes, also pro-pounded an alternative argument to the effect that some of the appellants "lacked standing" to enforce the arbitration agreement. The Court disposed of this latter argument by remanding it for determination by the state court of appeal, and in that connection charac-terized the argument as presenting merely "a

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(footnote cont'd.) in Lueck is simply that, wherever the limits of federal preemption may ultimately be drawn, with respect to arbitra-tion law as well as labor law, those limits should not be drawn in such a way as to "ele-vate form over substance." As the foregoing discussion has demonstrated, acceptance of Stanford's contention on this issue would obviously have precisely this sort of undesirable effect.

straightforward issue of contract interpretation." Id., 107 S.Ct. at 2527. Stanford contends that this action by the Court represented a holding to the effect that the issue presented by this argument was purely one of state law, and that the same result should follow by analogy with respect to the issue of interpretation that is presented in this case (Stanford's Brief, pp. 13-14).

This contention reflects an obvious misreading of the Court's ruling in Perry. While the Court did indeed remand the "standing" issue for determination by the state court, it emphatically did not hold, as Stanford asserts, that the issue should ultimately be resolved under state law rather than federal law. In fact, as Stanford itself later implicitly acknowledges, the Court went out of its way to indicate that it was not purporting to decide this question of the applicable law, inasmuch as it appended to its order of remand a footnote prescribing some of the standards that should be utilized by the state court to determine whether the "standing" issue should

eventually be decided under federal or state law. Id., 107 S.Ct. at 2527n.9. Thus, far from supporting Stanford's view that the federal rule at issue here is applicable only to the intrepretation of the language of the arbitration clause, this aspect of the Perry decision actually supports precisely the opposite conclusion - namely, that there are indeed potential issues other than interpretation of the arbitration clause that may need to be resolved in exclusive accordance with the federal policies underlying the Arbitration Act.

As noted above, Stanford does obliquely acknowledge this evident contradiction in its argument, by going on to discuss the standards for determining the proper scope of federal preemption that were actually prescribed by the Court in the footnote to its Perry opinion (Stanford's Brief, pp. 14-15). The conclusion Stanford purports to reach in that discussion, however, is demonstrably erroneous, as the following analysis will establish.

In the footnote in Perry, the Court stated that, as a general matter, principles of state

law may properly be applied to the interpretation and enforcement of arbitation agreements under the federal Act only if those principles "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," and may not be so applied if they "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue." Id., 107 S.Ct. at 2527n.9. Asserting, without analysis, that the choice-of-law "principle" relied upon by the court of appeal in this case is one that "arose to govern ... contracts generally," Stanford concludes that this supposed rule of state law should survive federal preemption under the standard thus laid down in the Perry opinion (Stanford's Brief, p. 15).

This conclusion, however, reflects a wholly inaccurate characterization of the purported "principle" of state law that is at issue here. As Volt demonstrated at some length in its opening brief, the court of appeal's holding that the application of federal law is precluded by a choice-of-law clause specifying "the law of the place where the project is located"

did not in fact "arise" from any general principle of state contract law whatsoever, but was instead spontaneously conceived to dispose of the specific question of federal preemption that was presented by this case (see Opening Brief, pp. 36-41, 91-93fn.). Moreover, since the only evident function of this so-called "principle" is to determine the applicablity of federal law under a choice-of-law clause, and since the only cases in which it has ever been applied by any court in any jurisdiction have been suits for enforcement of arbitration agreements under the Federal Arbitration Act (see Opening Brief, pp. 90-91), it can hardly be characterized as applying to "contracts generally," and indeed seems to fit much more closely the description of a rule that "takes its meaning precisely from the fact that a contract to arbitrate is at issue." Perry, supra, 2527n.9. Thus, once again, Stanford's own argument ultimately comes full circle to support a conclusion that is diametrically opposed to the one it is seeking to establish.

Stanford's only other point concerning this

issue is an observation to the effect that the application of federal law to the interpretation of provisions of the contract other than the arbitration clause might expand the range of situations in which "the same words in the same provisions [would] mean different things" depending on the factual and legal context of their application. For the most part, however, this is simply an unavoidable shortcoming of human language, in which it is inherent that "terms may shift in reference with occasions of use." Quine, Word and Object §30, p. 141 (1960). Nor is it so obviously inappropriate that contractual provisions should be applied somewhat differently when they affect the implementation of important federal policies, such as the one favoring arbitration. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24-25. Finally, in any event, no real danger of this sort of divergent interpretation is presented with respect to the particular issue involved here, since, as was shown in the opening brief, the decisions of the federal and state courts are virtually

unanimous in subscribing to a single uniform construction of the particular type of contractual provision that is at issue in this case.*

Thus, Stanford's arguments are ultimately ineffective to disprove, and indeed only seem to reinforce, the proposition that the federal rule of "generous construction" of arbitration agreements is indeed fully applicable to the problem of interpretation that is presented by this case. Far from constituting an "amazing" extension of existing law, this particular application of this settled federal rule proceeds quite naturally and directly from both

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* Since the filing of the opening brief, two more decisions representing the overwhelming majority view on the interpretation of this type of choice-of-law provision have come to Volt's attention, one of which was located by further research and the other of which, surprisingly, was disclosed by Stanford itself, which mistakenly cites the decision in support of its otherwise irrelevant observation that contractual and statutory choice-of-law provisions designating the law of the place where a transaction is to be carried out are ordinarily interpreted to refer to state law where no question of the possible application of federal law is presented. Howard Elec. & Mech. Co. v. Frank Briscoe Co., 754 F.2d 847, 850 (9th Cir. 1985); Starr Elec. Co. v. Basic Constr. Co., 586 F.Supp. 964, 969n.5 (M.D.N.C. 1982) (cited at page 33 of Stanford's brief).

the language and the holdings of this Court's several decisions enunciating the content and scope of the rule. This rule therefore stands confirmed as a valid ground for sustaining both the Court's jurisdiction of this appeal and the ultimate conclusion that the decision below should be reversed on the merits.

B. In Any Event, the Federal Rule of "Generous Construction" of Arbitration Agreements Provides Only One of the Numerous Alternative Grounds That Support Volt's Position on This Appeal, the Remainder of Which Have Been Largely Ignored by Stanford in Its Responsive Brief.

Finally, at all events, even if the preceding analysis should be disregarded in favor of giving full credence to Stanford's minatory admonitions about the dire effects of applying the rule of "generous construction" in this case, this result would ultimately avail Stanford little. For, as it happens, the whole issue of the applicability of this federal rule to this case relates to only one of the numerous separate grounds that support Volt's position on both the jurisdictional issue and the merits of this appeal. Indeed, with regard to the merits of the case, Volt itself has readily

acknowledged that application of the rule of "generous construction" may well be redundant in the light of the several other compelling considerations that require the inclusion of federal law within the scope of the phrase "law of the place where the project is located" (Opening Brief, pp. 92-93). Similarly with respect to the issue of jurisdiction, Volt has adduced no less than seven alternative grounds, besides the doctrine of "generous construction," that would amply support the Court's assumption of jurisdiction over this appeal (Opening Brief, pp. 25-49, 53-58).

Although space does not permit a recapitulation of these numerous other reasons justifying Volt's position on these issues, there are, for present purposes, three important points that should be made about these several alternative grounds. First, as the discussion in the opening brief makes clear, none of these additional grounds is in any way dependent on an application of the rule of "generous construction" to this case, and all of them are therefore capable of vindicating Volt's posi-

tion entirely without regard to the outcome of the parties' opposing arguments about the application of that rule in this context. Second, Stanford has completely ignored many of these other grounds in its responsive brief, and in some cases has even expressly conceded their essential validity (e.g., Stanford's Brief, pp. 1-2, 12n.13). Finally, none of these alternative reasons is even arguably subject to the objection that the Court's reliance upon it to decide this case would effect an "amazing" or unwarranted expansion of the scope of federal law. Rather, as was demonstrated at length in the opening brief, each of them represents either a routine and closely circumscribed application of existing doctrine or a necessary corollary of some fundamental precept of federalism (see Opening Brief, pp. 25-49, 53-58).*

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* This last point is perhaps best illustrated by Volt's observation, in its opening brief, that the court of appeal's determination whether federal law is encompassed within the phrase "law of the place where the project is located" was necessarily dependent on a resolution of the quintessentially federal question whether federal law is, in fact, one of the bodies of law applicable at "the place" where this project was carried out (continued)

For all these reasons, it is evident that Stanford's challenge to Volt's reliance on the principle of "generous construction" of arbitration agreements is not only unsound, but also ultimately futile. Even if the Court should heed Stanford's arguments on that issue, the ultimate conclusions reached in Volt's opening brief would still survive unscathed, because each of those conclusions is amply vindicated in any event by any of several alternative reasons that are essentially unaffected by Stanford's arguments.

(footnote cont'd.) (see Opening Brief, pp. 48-49). The doctrine that this sort of logical dependence of a state court's judgment on a federal issue affords a sufficient basis for sustaining this Court's jurisdiction to review the judgment is very well settled, and its employment as a ground for upholding jurisdiction in this case would in fact represent a much less expansive application of the doctrine than has been made in many of the prior cases in which it has been employed for this purpose. Compare, e.g., South Dakota v. Neville, 459 U.S. 553, 556n.5 (1983); St. Martin Lutheran Church v. South Dakota, 451 U.S. 772, 780n.9 (1981); United Air Lines v. Mahin, 410 U.S. 623, 630-32 (1973); Standard Oil Co. v. Johnson, 316 U.S. 481, 482-83, 485 (1942); State Tax Comm. v. van Cott, 306 U.S. 511, 513-15 (1939). See, generally, Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 557-63 (3d ed. 1988).

III. Stanford's Argument That This Case Should Be Reviewed by Certiorari Rather Than Appeal Is Without Merit and in Any Event Would Not Defeat the Court's Jurisdiction to Review the Court of Appeal's Judgment.

Stanford's argument that this case may not be heard by appeal, as opposed to certiorari, may be easily disposed of, since it contravenes the principles that have governed the application of 28 U.S.C. §1257(2) ever since the predecessor of that statute was first construed 65 years ago in the landmark decision of Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1923). In that case, the Court held that the "validity" of a state statute has been "drawn in question" within the meaning of that section whenever the appellant has contended in the court below that the statute would be invalid "as applied" to his particular situation, even though the statute is "not claimed to be invalid in toto and for every purpose." Id., 257 U.S. at 289. Likewise, it was held to be of "no importance" that the appellant has focussed his arguments on the circumstances attending the application of the statute rather than on its validity per se, so long as it appears that

he has expressly challenged the validity of the statute as applied to him at some point in the course of the proceedings. Id. at 290. Finally, the Court dismissed as irrelevant the question whether the state court has expressly addressed the issue of the statute's validity, holding that it is sufficient merely to show that the statute in fact has been "applied and enforced to the [appellant's] disadvantage" by the state court's judgment. Id.. All of these basic principles thus laid down by this seminal decision have been reaffirmed and consistently applied by this Court in every subsequent decision involving the propriety of an appeal under section 1257(2) down to the present time. E.g., R.J. Reynolds Tobacco Co. v. Durham County, __ U.S. __, 107 S.Ct. 499, 505 (1986); McCarty v. McCarty, 453 U.S. 210, 219n.12 (1981); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 440-41 (1979).

This case fits squarely within the coverage of these settled rules. As Volt showed in its jurisdictional statement (at pp. 5-7), its claim that §1281.2(c) of the California Code of

Civil Procedure was preempted and rendered void as applied to this case was raised at every stage of the state-court proceedings, wherein Volt variously contended that the provisions of this statute, if so applied, would "directly conflict with the FAA," that the federal Act "would directly preempt the contrary prescription" of this state law, and that application of this section to this case would "violate[] the Supremacy Clause and is null and void" (J.S. App. E-6, E-9, F-1-2, F-8, F-13, G-7). The state courts nevertheless proceeded to apply and enforce the statute "to [Volt's] disadvantage" by affording Stanford the benefit of the statutory exemption from its duty to arbitrate despite the clear contrary dictates of federal law. Under the holdings in Dahnke-Walker and its progeny, this was plainly sufficient to bring this case within the terms of 28 U.S.C. §1257(2), and thus to authorize an appeal from the state court's judgment.

Stanford's only arguments to the contrary are indistinguishable from the arguments that were specifically rejected by the Court in

Dahnke-Walker and in every subsequent decision on this issue. Thus, while Stanford asserts that the state court's ruling in this case does not directly address the validity of the state statute but instead "simply upholds the validity of the parties' agreement,"* these decisions hold that it does not "matter on what ground the court upheld and enforced the statute," so long as the statute was in fact applied by the court in the face of a claim that its application would offend federal law. Dahnke-Walker Milling Co. v. Bondurant, supra, 257 U.S. at 289. See also Japan Line, Ltd. v. County of Los Angeles, supra, 441 U.S. at 441; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975). Similarly, while Stanford correctly observes that much of Volt's argument in the state courts and on this appeal "is directed to the contract interpretation" rather than to the validity of the state statute per se, these decisions further establish that "no importance"

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* This assertion is inaccurate in any event, since the court actually addressed the preemption claim at some length in its opinion and rejected that claim on its merits (JA 68-77).

is to be attached to the fact that the appellant addresses his principal arguments to particular issues affecting the statute's application, so long as he has made clear that the ultimate result he seeks is a ruling that the statute cannot be applied to his situation without transgressing the superior command of federal law. Dahnke-Walker, supra at 290. See also International Longshoremens Assn. v. Davis 476 U.S. 380, 385, 387n.8 (1986); McCarty v. McCarty, supra, 453 U.S. at 19n.12. Thus, unless this Court now wishes to disavow the venerable principles that have guided decision in this area for so many decades, Stanford's arguments on this issue, like the identical arguments unsuccessfully advanced in countless previous cases, must be emphatically rejected.*

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* For the Court to repudiate these principles at this particular time would be especially inappropriate in the light of the recent amendment to the terms of 28 U.S.C. §1257, which has effectively abolished the distinction between certiorari and appeal in this type of case. Public Law 100-352, 102 Stat. 662. Under this enactment, the entire issue under discussion here will be rendered moot in all cases arising after the enactment's effective date of September 25, 1988. Id., §§3, 7.

Nor do the authorities cited by Stanford cast any doubt on this conclusion, since none of them involved any issue even remotely similar to the one presented here. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984) (validity of statute never raised in proceedings below); Local 926, Int'l. Union of Operating Engrs. v. Jones, 460 U.S. 669, 675 (1983) (state's common law not a "statute"); Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 42-43 (1983) (public contract not a "statute"). Indeed, the only real relevance of any of those decisions to the present case derives from the fact that the Court in each of those cases, upon dismissing the appeal, simultaneously granted certiorari to review the "important" issue presented by the case. Silkwood, supra at 248; Perry Educ. Assn., supra at 43-44. Accord Local 926, supra at 675. As the Court knows, this practice, which is sanctioned by statute, is quite common in cases in which an appeal is found to have been improvidently taken after full briefing on the merits. 28 U.S.C. §2103. See Stern et al., Supreme Court

Practice 117-18 (6th ed. 1986). On the authority of the decisions cited by Stanford itself, therefore, Volt respectfully requests that, in the unlikely event Stanford's argument on this issue should be accepted, the Court should then treat Volt's jurisdictional statement as a petition for certiorari and should proceed to review the case on that basis.

IV. Stanford's Contention to the Contrary Notwithstanding, There Is No Serious Doubt That the Federal Arbitration Act Would Preempt the Conflicting Prescriptions of California Law if the Choice-of-Law Clause in the Parties' Agreement Were Not Interpreted to Foreclose the Application of the Act to This Case.

Stanford has proferred an alternative argument to the effect that the Arbitration Act would not preempt Cal.Code Civ.Proc. §1281.2(c) even if the choice-of-law clause were interpreted to permit the application of federal law to this case (Stanford's Brief, pp. 43-50). This argument has not previously been given a full-dress exposition by Stanford in the course of this litigation, having been presented only in a cursory fashion or not at all in Stanford's earlier filings (see, e.g., Motion to Dismiss or Affirm, p. 8n.2). This history of

comparative neglect is understandable since, as will now be demonstrated, the argument does not in fact merit serious consideration.*

Stanford's argument goes something like this: Volt's contention that the Arbitration Act would preempt the conflicting prescriptions of §1281.2(c) "assumes the premise that §§3 and 4 [of the federal Act] apply in state court" (Stanford's Brief, p. 44). But this Court's decisions have indicated that only the substantive provisions of section 2 of the Act are applicable in state proceedings, and the Court has expressly declined, in a certain footnote in its opinion in Southland Corp. v. Keating, supra, to apply the "procedural" provisions of

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* Stanford's assertion of this argument is also somewhat paradoxical in the light of its simultaneous contention that this Court lacks jurisdiction to hear this case as an appeal under 28 U.S.C. §1257(2). As indicated in the preceding section, the express premise of the latter contention is that the only issue presented by this case is the interpretation of the choice-of-law clause in the parties' agreement (see Stanford's Brief, p. 4). By now arguing that the case also presents a serious question whether state law would be preempted even in the absence of the choice-of-law clause, Stanford would seem to have contradicted this essential premise of its own earlier argument.

sections 3 and 4 to the state courts (id., pp. 45-47). Since the essential premise of Volt's contention is thus belied, the contention itself must be rejected, and this Court must accordingly hold that section 1281.2(c) would survive federal preemption even in the absence of the choice-of-law clause (id.).

Every element of this argument is erroneous. In the first place, notwithstanding the somewhat enigmatic footnote in the Southland opinion, the law is reasonably well settled to the effect that sections 3 and 4 of the Arbitration Act do indeed apply in state courts to the same extent as in federal courts. Secondly, in any event, Volt's contention on this issue does not in fact "assume the premise" that §§3 and 4 are applicable in state proceedings, but is fully supportable on an entirely independent ground, and is validated in any event by the specific holdings of this Court on the particular issue that is presented by this case. Both of these propositions will be demonstrated in the discussion that follows.

The question whether §§3 and 4 of the Arbi-

tration Act apply in state proceedings was examined at some length in Volt's reply brief in the court of appeal (id., pp. 15-34). While space does not permit a repetition of that discussion here, its essential conclusions may be briefly summarized. Volt showed, first of all, that although this Court had indeed expressly disclaimed any decision of this question in its opinion in the Southland case (465 U.S. at 16 n.10), the Court had already clearly ruled, in its earlier opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, that "state courts, as much as federal courts, are obliged to grant stays of litigation under §3 of the Arbitration Act," and that the application of section 3 in state courts, and perhaps section 4 as well, was indeed "necessary to carry out Congress' intent to mandate enforcement of all covered arbitration agreements." Id., 460 U.S. at 26 and n.34. Second, despite the Court's reservation of the question in Southland, the actual holding of that case seemed to reaffirm the view that the application of these sections in state courts was indeed mandated by the Act.

See Southland, supra, 465 U.S. at 24, 31n.20 (O'Connor, J., noting in dissent that the Court had in fact enforced the agreement at issue in that case by "procedures that mimic those specified for federal courts by FAA §§3 and 4," and had thus effectively "made §3 of the FAA binding on the state courts"). See also Hirshman, The Second Arbitration Trilogy: the Federalization of Arbitration Law, 71 U.Va.L.Rev. 1305, 1344, 1362n.368 (1985). Third, the state courts themselves had unanimously held, both before and after Southland, that §§3 and 4 are fully applicable to state proceedings. Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 136 Cal.Rptr. 378, 381 (Cal.App.1977); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So.2d 790, 793 (Fla.App. 1981); Paine, Webber, Jackson & Curtis v. McNeal, 239 S.E.2d 401, 403 (Ga.App.1977); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 609-10 (Tex.App. 1984), cert. den. 469 U.S. 1127 (1985); Allison v. Medicab Int'l., Inc., 597 P.2d 380, 382 (Wash. 1979). Finally, in the course of a dissent from the denial of

certiorari in a case arising after Southland, two of the justices who had joined in the Southland opinion, while acknowledging that Southland had indeed "reserved the question," had nevertheless cited with apparent approval both the Court's prior pronouncements in Moses H. Cone and the unanimous decisions of the state courts to the effect that section 3, at least, was indeed enforceable in the state courts. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127, 1129n.2 (1985) (White and Blackmun, JJ., dissenting). From all these indications, it seemed clear, despite the disclaimer in Southland, that the applicablity of §§3 and 4 of the Act in state courts had become reasonably well established.

Well nigh conclusive verification of this view was furnished by this Court after the filing of Volt's reply brief in the court of appeal when the Court handed down its 1987 decision in Perry v. Thomas, supra. In that case, the Court reversed a California court of appeal's denial of a petition to compel arbitration that had been brought in the state

court solely on the basis of section 4 of the federal Act. Id., 107 S.Ct. at 2523n.1. Although the Court's only express discussion of the applicability of that section consisted of the general observation that "[s]ection 4 mandates judicial enforcement of arbitration agreements" (id.), the holding of the Court requiring enforcement of the petition on these facts necessarily provided a clear affirmation that section 4 (and therefore necessarily §3 as well - see Moses H. Cone, supra at 26n.34) is in fact applicable in state-court proceedings. Thus, any doubt that may have been expressed on this score in the Southland opinion has now apparently been resolved by the Court, with the result that the applicablity of §§3 and 4 in state courts can now confidently be characterized as the settled law of the land. To the extent that Volt's claim of preemption "assumes the premise" that these sections are applicable in this case, that premise therefore seems eminently sound and firmly established.

Secondly, in any event, Volt's conclusion

that Cal. Code Civ. Proc. §1281.2(c) is pre-empted by the federal Act is not by any means exclusively dependent on the premise that sections 3 and 4 apply to this state court proceeding. As will now be shown, this conclusion follows directly from the decisions of this Court without reference to that particular premise, and is also amply justifiable on at least one other independently sufficient and fully persuasive rationale.

The question whether the federal Act pre-empts state procedures exempting a party from his duty to arbitrate because of the presence of related non-arbitrable claims against third parties was specifically resolved by this Court in its decision in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra. That case involved a factual situation identical to the one presented here, wherein a construction contractor seeking to compel arbitration of a dispute with the owner had been denied relief on account of the pendency of a state-court suit involving a non-arbitrable claim for indemnity against the project architect. Although the ultimate issue

presented to this Court was whether a federal district court should have abstained from enforcing the arbitration agreement during the pendency of the state proceedings, the Court was also required to address the further question whether the state court could properly refuse to compel arbitration under these circumstances, in order to dispose of the owner's contention that duplication and inefficiency would result from the federal court's enforcement of the agreement to arbitrate. That issue was resolved by the Court as follows (id., 460 U.S at 20-21; emphasis in original):

> "The Hospital points out that it has two substantive disputes here - one with Mercury, ... and the other with the architect. ... It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between Mercury and the Hospital is arbitrable under the Act, then the Hospital's two disputes will be resolved separately - one in arbitration, and the other (if at all) in state court litigation. Conversely, if the dispute

> between Mercury and the Hospital is not arbitrable, then both disputes will be resolved in state court. But neither of those two outcomes depends at all on which court decides the question of arbitrability. Hence, a decision to allow that issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes."

Thus, the precise issue presented by this case - whether federal law requires a state court to enforce an arbitration agreement despite the presence of non-arbitrable claims against third parties - has been squarely decided by this Court. Whatever uncertainty may subsequently have been created, by the Southland footnote or otherwise, regarding the general theoretical underpinnings of federal preemption in this area, this specific ruling of the Cone decision has never been questioned by the Court, and indeed has been expressly reaffirmed on at least one occasion. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985). It follows that, whether this conclusion is "premised" upon sections 3 and 4 of the Act or some other basis, the specific rule that governs the disposition of the particular issue presented here must be regarded as

well settled. Since the provisions of Cal. Code Civ. Proc. §1281.2(c) directly contravene that rule, those provisions must therefore be deemed preempted by federal law. Accord, Liddington v. The Energy Group, 238 Cal.Rptr. 202, 206-7 (Cal.App. 1987).

Moreover, even if the precedential weight of the Cone decision were not alone sufficient to dictate this result, and even if, as is being assumed here, sections 3 and 4 of the Act are likewise unavailable for this purpose, the conclusion that the federal Act preempts California law on this issue would still be readily supportable on a compelling alternative ground. That alternative ground is provided by the settled general rule that a "federal right cannot be defeated by the forms of local practice," and that even the purely substantive requirements of federal law may therefore have the effect of preempting state procedures where those procedures "impose unnecessary burdens upon rights of recovery authorized by federal laws." Brown v. Western Ry. Co., 338 U.S. 294, 296, 298-99 (1949).

This familiar principle has been applied to effect a partial "federalization" of state procedures under a variety of federal statutes, and has even been acknowledged as a potential alternative basis for the Court's recent pre-emption decisions under the Arbitration Act by the most prolific dissenter from those decisions. Southland Corp. v. Keating, supra, 465 U.S. at 31 (O'Connor, J., dissenting). See, e.g., Felder v. Casey, __ U.S. __, 56 USLW 4689, 4691-92, 4694-95 (June 22, 1988); St. Louis S.W. R.R. Co. v. Dickerson, 470 U.S. 409, 411 (1985); Liner v. Jafco, Inc., 375 U.S. 301, 304-9 (1964); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952); Brown v. Western Ry. Co., supra, 338 U.S. at 296-98; Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-47 (1942); American Ry. Express Co. v. Levee, 263 U.S. 19, 20 (1923). See, generally, Bator et al., supra at 628-38. The most recent thorough exposition of the principle was provided by the Court's opinion in Felder v. Casey, supra, where the Court held that a state notice-of-claims statute was preempted by the

substantive provisions of 42 U.S.C. §1983 in an action brought under that statute in a state court. In justification of this holding, the Court said (56 USLW at 4691, 4694-95):

> "[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' Brown v. Western Railway of Alabama, 338 U.S. 294, 296 (1949). The question before us today, therefore, is essentially one of preemption: is the application of the State's notice-of-claim provision to §1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead '"stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"'? Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). ...
>
> "Respondents ... note that '[t]he general rule, bottomed deeply in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' Brief for Amici Curiae 8 (quoting Hart, The Relations Between State and Federal Law, 54 Colum.L.Rev. 489, 508 (1954). ... [But] [f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose' unnecessary burdens upon rights of recovery authorized by federal laws.' Brown v. Western R. Co. of Alabama, 338 U.S., at 298-99; ...
>
> "[A state] may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when brought in federal court, for '[w]hatever spring[s] the State may set for those who are endeavoring to assert rights that

> the State confers, the assertion of federal rights, when plainly and seasonably made, is not to be defeated under the name of local practice.' Brown v. Western R. Co. of Alabama, 338 U.S., at 299 (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923))."

These principles have obvious application in the present context. Since there is no dispute that if Volt's petition to compel arbitration had been brought in a federal court, the petition would have been granted despite the obstacle to such enforcement presented by Cal. Code Civ. Proc. §1281.2(c), the application of that state statute in this case would necessarily "alter the outcome" of the case relative to the outcome that would have been achieved in a federal court. Felder v. Casey, supra, 56 USLW at 4695. Similarly, since this Court has specifically held that "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements [to arbitrate] ... even if the result is piecemeal litigation" (Dean Witter Reynolds, Inc. v. Byrd, supra, 470 U.S. at 221), it is also clear that the statutory immunity from arbitration conferred

by §1281.2(c) would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Felder v. Casey, supra at 4691. Given these circumstances, the principles laid down in Felder v. Casey and the numerous similar decisions cited above clearly dictate that this state statute must be denied enforcement in this case on the ground that it is preempted by the overriding substantive prescriptions of the Federal Arbitration Act.

It follows that these decisions would be sufficient in themselves to require this result without regard to either the precedential effect of the Cone decision or the question of the applicability of the "procedural" provisions of sections 3 and 4 of the federal Act in state courts. On any conceivable version of the existing law, therefore, there is no arguable basis for Stanford's contention that Cal. Code Civ. Proc. §1281.2(c) might survive federal preemption in this case even in the absence of the choice-of-law clause in the parties' contract.

V. Stanford's Argument About the Perceptions of "Ordinary People," to the Extent It Has Any Meaning at All, Is Basically Inaccurate.

Another new argument raised by Stanford in its responsive brief consists of its repetitive assertions that Volt's proferred interpretation of the choice-of-law clause reflects an esoteric view of the language of the clause that would not be shared by "ordinary people" (Stanford's Brief, pp. 34-39). Stanford chides Volt, in particular, for citing The Federalist in support of its contention that the contractual language must be interpreted to encompass federal law. Stanford opines that "ordinary people ... do not travel with the Federalist" and therefore, presumably, would be unlikely to know that a reference to "the law of the place where the project is located" might include federal law (id., p. 39).

To the extent that these observations about the perceptions of "ordinary people" amount to anything more than vacuous speculation, they are in any event fundamentally inaccurate. In fact, if there is any authority - among all the cases, statutes, treatises, etc., cited by the

parties on this appeal - that is most likely to be familiar to "ordinary people," it is undoubtedly The Federalist. Certainly, that work is more commonly known to the general public than section 1281.2(c) of the California Code of Civil Procedure, or, for that matter, the Federal Arbitration Act. Similarly, if there is any legal principle, among all those bandied about by the parties in this proceeding, that is most likely to be known to these same "ordinary people," it is the rule that federal law is "the supreme law of the land" in this federal union.

Once again, therefore, Stanford is hoist by its own petard. If its appeal to the views of "ordinary people" ultimately leads anywhere, it leads to the conclusion that most "ordinary people" would have readily perceived the phrase "law of the place where the project is located" to encompass federal law, because, as every high-school civics student well knows, federal law, in its embodiment as the supreme law of every state, is applicable at every "place" throughout the nation.

VI. Conclusion

For all of these reasons, Volt respectfully submits that the arguments of Stanford discussed herein should be rejected, that the substantive issues presented by this case should be considered on their merits, and that the judgment of the court of appeal should be reversed with a direction that Volt's petition to compel arbitration be granted.

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Respectfully submitted,

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